Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — TAX APPEAL NO R2-14-6 OF 1996
NIK HASHIM J
16 JULY 1998

Revenue Law *— Income tax — Additional assessment — Appellant purchased properties to erect cinema hall — Approval rejected — Properties sold at gain — Appellant charged with real property gains tax — Certificate of clearance issued — Whether certificate was final — Whether Director General of Inland Revenue had power to vacate and discharge the real property gains tax assessment*

Revenue Law *— Real property gains tax — Realization of capital asset — Approval rejected to erect cinema hall — Properties subsequently sold for a gain — Whether properties were purchased for investment purposes — Whether gain from sale of land liable to income tax or real property gains tax*

The appellant entered into an agreement to purchase three lots of land totalling four acres ('the subject properties'). Clause 7 of the agreement provided that should the appropriate authority not give approval for the erection of a cinema hall on any part of the subject properties, the purchase price was to be increased. The appellant successfully applied for conversion of land use from residential to limited commercial use. However, the Dewan Bandaraya Kuala Lumpur ('DBKL') rejected the appellant's application to build a cinema hall on the subject properties but the appellant did not appeal against the rejection. Following the DBKL's rejection, the appellant sold the subject properties at a gain. Subsequently, additional assessments to income tax were made by the Director General of Inland Revenue.

The appellant appealed against the order of the Special Commissioners of Income Tax ('the special commissioners') confirming the additional assessments under the Income Tax Act 1967 ('the Act'). The issue for the determination of the special commissioners was whether the gain made by the appellant from the disposal of a property was assessable to income tax under s 4(a) of the Act or whether it amounts to a realization of capital asset and thereby liable to real property gains tax ('RPGT') under the Real Property Gains Tax Act 1976 ('the RPGTA'). The appellant contended that the respondent was debarred from raising assessment to income tax, as after having previously been charged with RPGT, a certificate of clearance was issued to this effect and it was final for all purposes. The appellant also contended that the subject properties were purchased for investment and their subsequent disposal, by a forced sale, was a realization of a capital asset attracting RPGT and not income tax.

Held, dismissing the appeal:

(1) The principle of res judicata has no application if the gain assessed to RPGT turns out in law to be a gain assessable to income tax. What is final and conclusive in the RPGT assessment is the amount of real property gains tax assessed under the RPGTA. The issue of whether the gain was chargeable to income tax or real property gains tax had not been determined. Thus, there was no finality on this case. Alternatively, if the gain is found to be income in nature as opposed to capital in nature, then the RPGT assessment is a nullity because under the RPGTA, real property gains tax is chargeable only in respect of a chargeable gain accruing on the disposal of real property. Thus, the assessment for capital gain issued by the respondent against the appellant became invalid. Therefore, there was no prohibition against the respondent issuing the subsequent assessments under the Act (see pp 200G–H and 201A–C); *Scorer (Inspector of Taxes) v Olin Energy Systems Ltd* [1985] 2 All ER 375 distinguished.

(2) Under s 20(2) of the RPGTA, an assessment which has become final and conclusive for all purposes of the RPGTA shall not prevent the Director General from making a revision under s 19(1). Therefore, the respondent has the power to vacate and discharge an assessment (see p 201G–H); *Craven (Inspector of Taxes) v White* [1987] 3 All ER 27 distinguished.

(3) Double taxation occurs where a taxpayer is subject to two different charges in tax in respect of the same receipt. There was no question of double taxation in this case because the respondent was not seeking to impose both real property gains tax and income tax on the appellant. The RPGT assessment would be amended and the amount of tax paid would be transferred to the appellant's account (see p 202B–C).

(4) The special commissioners' decision that the subject properties were not investment was essentially a question of fact. They had thoroughly considered and determined the issue of the intention on the part of the appellant. The subject properties were not investment because cl 7 of the agreement provided that the erection of the cinema hall was conditional upon approval being obtained from the DBKL. Since no approval was obtained, cl 7 became null and void and the appellant could no longer rely on it in support of its argument that the subject properties were acquired as an investment (see p 202E–I).

(5) No evidence was led to show why the appellant could not proceed with the development of the subject properties after the rejection by the DBKL. However, the appellant did not appeal against the decision of the DBKL and the company had decided to abandon undertaking the business of theatre proprietors and managers following the rejection. Since the subject properties were already approved by the DBKL for limited commercial use, it could not

A be said that the subject properties were of no use to the appellant (see p 203F–H).

[Bahasa Malaysia summary

B Perayu telah mengikat satu perjanjian untuk membeli tiga lot tanah yang jumlah keluasannya empat ekar ('hartanah yang diperihalkan'). Fasal 7 perjanjian tersebut memperuntukkan bahawa sekiranya pihak berkuasa yang berkenaan tidak memberikan kelulusan untuk mendirikan sebuah panggung wayang di atas mana-mana bahagian hartanah yang diperihalkan itu, harga belian hendaklah dinaikkan. C Perayu telah berjaya memohon untuk penukaran kegunaan tanah daripada kediaman kepada kegunaan komersil yang terhad. Walau bagaimanapun, Dewan Bandaraya Kuala Lumpur ('DBKL') telah menolak permohonan perayu untuk membina sebuah panggung wayang di atas hartanah yang diperihalkan tetapi perayu telah tidak merayu terhadap penolakan tersebut. Berikutan dengan penolakan D DBKL, perayu telah menjual hartanah yang diperihalkan dengan harga yang menguntungkan. Berikutan itu, taksiran-taksiran tambahan kepada cukai pendapatan telah dibuat oleh Ketua Pengarah Hasil Dalam Negeri.

Perayu telah merayu terhadap perintah Pesuruhjaya Khas Cukai E Pendapatan ('pesuruhjaya khas') yang mengesahkan taksiran-taksiran tambahan di bawah Akta Cukai Pendapatan 1967 ('Akta tersebut'). Isu untuk penentuan pesuruhjaya khas tersebut adalah sama ada keuntungan yang dibuat oleh perayu daripada pelupusan sesuatu hartanah adalah boleh ditaksirkan untuk cukai pendapatan di bawah F s 4(a) Akta tersebut atau sama ada ia membawa kepada pelangsaian aset modal dan dengan itu bertanggungan kepada cukai keuntungan harta tanah ('CKHT') di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('ACKHT'). Perayu menegaskan bahawa penentang dihalang daripada membangkitkan taksiran kepada cukai pendapatan, kerana setelah dahulunya dikenakan CKHT, satu perakuan pelepasan G telah dikeluarkan mengenainya dan ianya adalah muktamad bagi segala tujuan. Perayu juga menegaskan bahawa hartanah yang diperihalkan telah dibeli bagi tujuan pelaburan dan pelupusannya berikutan itu, melalui jualan paksa, merupakan pelangsaian aset modal yang menarik perhatian ACKHT dan bukannya cukai pendapatan.

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Diputuskan, menolak rayuan:

(1) Prinsip res judicata tidak terpakai jika keuntungan yang ditaksirkan membawa kepada CKHT di sisi undang-undang dan menjadi suatu keuntungan yang boleh ditaksirkan untuk cukai pendapatan. I Apa yang muktamad dalam taksiran CKHT ialah jumlah cukai keuntungan hartanah yang ditaksirkan di bawah ACKHT. Isu sama ada keuntungan tersebut boleh dikenakan cukai pendapatan atau cukai keuntungan harta tanah masih belum ditentukan.

Dengan itu, tidak terdapat sebarang kemuktamadan atas kes ini. Secara alternatif, jika keuntungan tersebut didapati bersifat pendapatan bertentangan dengan yang bersifat modal, maka taksiran CKHT tersebut adalah suatu pembatalan kerana di bawah ACKHT, cukai keuntungan harta tanah boleh dikenakan hanya berkenaan dengan keuntungan terakru ke atas hartanah yang dilupuskan. Dengan itu, taksiran untuk keuntungan modal yang telah dikeluarkan oleh penentang terhadap perayu menjadi tak sah. Oleh itu, tidak terdapat larangan terhadap penentang yang mengeluarkan taksiran yang berikutan di bawah Akta tersebut (lihat ms 200G–H dan 201A–C); *Scorer (Inspector of Taxes) v Olin Energy Systems Ltd* [1985] 2 All ER 375 dibeza.

(2) Di bawah s 20(2) ACKHT, sesuatu taksiran yang telah menjadi muktamad bagi kesemua tujuan ACKHT tidak akan menghalang Ketua Pengarah daripada membuat semakan di bawah s 19(1). Dengan itu, penentang mempunyai kuasa untuk mengosongkan dan menghentikan suatu taksiran (lihat ms 201G–H); *Craven (Inspector of Taxes) v White* [1987] 3 All ER 27 dibeza.

(3) Pencukaian berganda berlaku di mana pembayar cukai tertakluk kepada dua pengenaan cukai yang berlainan berhubung dengan penerimaan yang sama. Tidak terdapat persoalan cukai berganda dalam kes ini kerana penentang bukannya cuba untuk mengenakan kedua-dua cukai keuntungan harta tanah dan cukai pendapatan ke atas perayu. Taksiran CKHT tersebut akan dipinda dan jumlah cukai yang telah dibayar akan dipindahkan kepada akaun perayu (lihat ms 202B–C).

(4) Keputusan pesuruhjaya khas bahawa hartanah yang diperihalkan bukannya merupakan pelaburan adalah pada hakikatnya suatu persoalan fakta. Mereka telah mempertimbangkan dan menentukan secara mendalam isu mengenai niat tersebut pada pihak perayu. Hartanah yang diperihalkan bukannya merupakan pelaburan kerana fasal 7 perjanjian tersebut memperuntukkan bahawa pembinaan sebuah panggung wayang adalah bersyarat atas kelulusan diperolehi daripada DBKL. Oleh kerana tiada kelulusan telah diperolehi, fasal 7 menjadi tak sah dan batal dan perayu tidak lagi boleh bergantung padanya bagi menyokong penghujahannya bahawa hartanah yang diperihalkan telah diperolehi sebagai suatu pelaburan (lihat ms 202E–I).

(5) Tiada keterangan telah dikemukakan untuk menunjukkan mengapa perayu tidak dapat meneruskan dengan pembangunan hartanah yang diperihalkan selepas penolakan oleh DBKL. Walau bagaimanapun, perayu telah tidak merayu terhadap keputusan DBKL dan syarikat tersebut telah membuat keputusan untuk tidak menjalankan perniagaan tuan punya dan pengurus pawagam berikutan dengan penolakan tersebut. Oleh kerana hartanah yang diperihalkan telah diluluskan untuk kegunaan komersil terhad oleh DBKL, ia tidak boleh diperkatakan bahawa hartanah yang diperihalkan tidak berguna kepada perayu (lihat ms 203F–H).]

Notes

For cases on additional assessment on income tax, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1674–1691.

For a case on realization of capital asset, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1976.

Cases referred to

Bye (Inspector of Taxes) v Coren [1986] STC 393 (refd)

Chua Lip Kong v DGIR [1982] 1 MLJ 235 (refd)

Craven (Inspector of Taxes) v White [1987] 3 All ER 27 (distd)

Government of Malaysia v Sarawak Properties Sdn Bhd [1994] 1 MLJ 14 (refd)

Scorer (Inspector of Taxes) v Olin Energy Systems Ltd [1985] 2 All ER 375 (distd)

XY & Co, Re [1966] 2 MLJ 11 (refd)

Legislation referred to

Income Tax Act 1952 [UK] s 510(1)

Income Tax Act 1967 ss 4(a), 101

Interpretation Acts 1948 and 1967 s 40(1)

Real Property Gains Tax Act 1976 ss 3(1), 19(1), 20

Taxes Management Act 1970 ss 30A(4), 32(1)

James Loh Ching Yew (*James CY Loh & Co*) for the appellant.

Kok Keng Fai (*Legal Officer, Inland Revenue Board*) for the respondent.

Nik Hashim J: Pursuant to para 34 of Sch 5 to the Income Tax Act 1967 ('the Act'), the appellant, Teruntum Theatre Sdn Bhd, appealed by way of a case stated against the deciding order of the Special Commissioners of Income Tax ('the special commissioners') confirming the additional assessments made by the Director General of Inland Revenue ('the respondent') vide notices of additional assessments for years of assessment 1983 and 1985 dated 28 September 1989 and 19 July 1990 respectively under the Act.

The issue for the determination of the special commissioners is whether the gain made by the appellant from the disposal of a property is assessable to income tax under s 4(a) of the Act or whether it amounts to a realization of capital asset and thereby liable to real property gains tax ('RPGT') under the Real Property Gains Tax Act 1976 ('the RPGTA').

Briefly, the facts are that by an agreement dated 10 March 1973, the appellant, through its nominees, purchased three lots of land in undivided shares ('the subject properties') totalling four acres (174,240 sq ft) for RM2,331,480. However, cl 7 of the agreement provides that should the appropriate authority does not give approval for the erection of a cinema hall on any part of the subject properties, the purchase price was to be increased to RM2,613,600. The purchase price was paid by way of a bank

loan. The appellant had to pay enormous amounts as interest on the loan taken to purchase the land which produced no income. The appellant applied for conversion of land use from residential to limited commercial on 2 May 1978. The application for conversion was approved on 21 March 1979. The appellant paid the development charges amounting to RM265,000. The Dewan Bandaraya Kuala Lumpur ('DBKL') rejected the appellant's application to build a cinema hall on the subject properties on 21 October 1980. The appellant, however, did not appeal against the rejection.

By an agreement dated 4 December 1980, the appellant sold to Tessin Development Sdn Bhd 155163/174240 (approximately 89%) undivided share of the subject properties for a sum of RM10m. The appellant on 3 December 1981 took steps to evict the squatters from the land. By another agreement dated 29 February 1984, the appellant sold to Temana Sdn Bhd the remaining undivided share of the subject properties (18,816 sq ft) for a sum of RM13,171,200.

The contentions of the appellant before the special commissioners are repeated before me. On the preliminary objection, Mr James Loh Ching Yew, learned counsel for the appellant contends that the respondent is in law debarred from raising assessments to income tax after having previously charged the appellant to real property gains tax and after having issued a certificate of clearance to this effect. He submitted that once a certificate is issued, then it is final for all purposes and cited the English case of *Scorer (Inspector of Taxes) v Olin Energy Systems Ltd* [1985] 2 All ER 375 in support.

First, on the issue of finality, I, with respect, agree with the special commissioners when they approached the issue from two angles. In the first approach, the special commissioners concluded that s 20 of the RPGTA simply says that an assessment shall become final and conclusive only '... for all the purposes of this Act as regards the amount of the tax assessed under it or the tax relief for allowable losses'. The RPGT assessment cannot be final for all purposes including the exclusion of the provisions of the Act which is another statute. The principle of res judicata has no application if the gain assessed to RPGT turns out in law to be a gain assessable to income tax. It is pertinent to note that what is final and conclusive in the RPGT assessment is the amount of real property gains tax assessed under the RPGTA. The issue of whether the gain is chargeable to income tax or real property gains tax had not been determined. Thus, there is no finality on this case (see *Re XY & Co* [1966] 2 MLJ 11).

It has been decided in *Government of Malaysia v Sarawak Properties Sdn Bhd* [1994] 1 MLJ 14 that an estoppel against the government cannot be created by a taxing officer entering into an agreement purporting to conclude tax and related questions for future years, or conclude any expression of opinion or adopt any course of action. The case of *Bye (Inspector of Taxes) v Coren* [1986] STC 393 is authority for a similar principle that the Inspector of Taxes is not precluded from assessing for income tax even though there had been an assessment for capital gains tax which had become final.

A The second approach taken by the special commissioners is that if the gain is found to be income in nature as opposed to capital in nature, then the RPGT assessment is a nullity simply because under the RPGTA, real property gains tax is chargeable only in respect of a chargeable gain accruing on the disposal of real property (s 3(1) of the RPGTA), and since a gain for the purposes of RPGTA is defined as:

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> (a) gain other than gain or profit chargeable with or exempted from income tax under the income tax law;

then there is no chargeable gain for RPGTA purposes. Thus, the assessment for capital gain issued by the respondent against the appellant becomes C invalid. That being the case, I agree with the special commissioners' finding that there is no prohibition against the respondent issuing the subsequent assessments under the Act.

The case of *Scorer* cited by the appellant is distinguishable. There, the principle of finality is a decision based on s 510(1) of the UK Income Tax D Act 1952, relating to agreements in writing or otherwise, between a taxpayer and the Inspector of Taxes. The section is somewhat similar to our provision in s 101 of the Act. In the present case, however, there is no agreement in respect of assessment. Therefore, *Scorer*'s case is not applicable.

On the question of whether the respondent has the power to vacate the RPGT assessment, I with respect, agree with Mr Kok Keng Fai, learned E counsel for the respondent that the respondent has the power to review or revise an assessment which includes vacating or discharging an assessment on the ground that no real property gains tax is payable on the gains. Where an assessment for RPGT was made and subsequently it was discovered that there was no chargeable gain within the meaning of the F RPGTA and thus no real property gains tax is payable, obviously the respondent can and must discharge the assessment. This is exactly the position in the instant case.

Section 20(2) of the RPGTA provides that an assessment which has become final and conclusive for all purposes of RPGTA as regards the G amount of tax under it 'shall not prevent the Director General from making ... a revision under s 19(1)'. So, in the light of s 40(1) of the Interpretation Acts 1948 and 1967 which provides:

> Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the H doing of the act or thing;

the respondent, therefore, does have the power to vacate an assessment. Unlike the situation in the United Kingdom where they have s 32(1) of the UK Taxes Management Act 1970 ('the UK Taxes Act') which contains express provisions for the vacation of an assessment in specified I circumstances. Also, s 30A(4) of the UK Taxes Act specifically states:

> After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Act.

We have no such provisions in our Act or the RPGTA. Thus, the principle enunciated in *Craven (Inspector of Taxes) v White* [1987] 3 All ER 27 cited by the appellant as authority that there is no power on an inspector to vacate an assessment has no application here.

The appellant also complained that the imposition of real property gains tax and then income tax is an exercise in double taxation. There is no basis for such complaint. Double taxation occurs where a taxpayer is subject to two different charges in tax in respect of the same receipt. As rightly pointed out by the special commissioners at p 22 of the case stated, there is no question of double taxation in this case because the respondent is not seeking to impose both real property gains tax and income tax on the appellant. The respondent has informed the appellant that RPGT assessment will be amended and the amount of tax paid will be transferred to the appellant's account.

Thus, the special commissioners were correct to reject all the issues raised by the appellant in the preliminary objection.

On the merits of the appeal, the appellant contends that the subject properties were purchased for purposes of investment and the subsequent disposal, being a forced sale, was a realization of a capital asset.

The question of whether an asset is an investment or not is a question of fact. The special commissioners' decision that the subject properties were not investment is essentially a question of fact. In arriving at their decision, the special commissioners adopted the established principles relating to intention, namely:

(i) the intention alone is not the paramount consideration in deciding whether the subject properties were acquired for investment purposes;

(ii) the intention must be judged against the background of the acts and conduct of the appellant and the circumstances of the case;

(iii) the intention must be shown to have existed at the time of acquisition of the asset; and

(iv) the intention must amount to intention in law.

The special commissioners had thoroughly considered and determined the issue of the intention on the part of the appellant. With respect, I agree with the finding of the special commissioners that the subject properties were not investment because cl 7 of the agreement provides that the erection of the cinema hall was conditional upon approval being obtained from the DBKL. Therefore, the intention for the erection of the cinema hall was circumscribed and its implementation indefinite in point of time. Approval from the DBKL is beyond the control of the appellant. Since no approval from the DBKL for the erection of the cinema hall was obtained, cl 7 became null and void and the appellant can no longer rely on it in support of its argument that the subject properties were acquired as an investment.

As regards the appellant's witnesses, the special commissioners found that PW1 was truthful whereas PW2 untruthful for reasons appeared at p 41 of the case stated:

(i) In his (PW2's) evidence he said that he did not advertise for the sale of the subject land nor did he pay any broker's fees for such sale. The schedule of development expenditure of the appellant as at 30 November 1982 (see p 64 of exh B) shows, inter alia, that a sum of RM195,000 was paid as broker's commission for the sale of land.

(ii) PW2 said in evidence that the 'cinema land' was retained after the sale of the 'non-cinema land' to continue in their efforts to seek approval for the erection of the cinema. We are of the view that PW2 was not truthful when he said that. It must be remembered that pursuant to cl 7(b) of the acquisition agreement the area of the cinema hall must be not less than 30,000 sq ft. However, the area of land that they retained after the sale of the 'non-cinema land' to Tessin was only 18,816 sq ft (see pp 40–41 of exh C) or 11% of the subject land (see p 64 of exh B). Furthermore, the report of the directors for 1981 (see p 54 of exh B) has this to say:

> 'Following the rejection by the authorities of the company's application to build a cinema hall on the land acquired for this purpose, the company has decided to abandon the project of undertaking the business of theatre proprietors and managers ... .'

In the circumstances, it is ridiculous for PW2 to say that they did not give up the idea of putting up a cinema when the director's report says otherwise and the land retained is smaller. We would say that PW1 was truthful when he said that after the rejection of the plans there was no appeal.

The credibility of a witness is a matter strictly for the special commissioners as judges of facts to decide. This is a finding of fact. Therefore, the above finding on credibility of the witnesses is unassailable (*Chua Lip Kong v DGIR* [1982] 1 MLJ 235).

On the appellant's contention of a forced sale in respect of the subject properties after the rejection by the DBKL of a plan to build a cinema hall, the special commissioners rightly rejected it on the ground that no evidence was led to show why the appellant could not proceed with the development of the subject properties after the rejection, if in fact investment was their true motive. The appellant, however, did not appeal against the decision of the DBKL and the report of the directors for 1981 states that the company has decided to abandon the project of undertaking the business of theatre proprietors and managers following the DBKL's rejection. Moreover, the subject properties were already approved by the DBKL for limited commercial use. Thus, it cannot be said that the subject properties were of no use to the appellant.

On the question of the appellant's accounts in exh B which state the subject properties were fixed assets, the special commissioners had correctly weighed and rejected the evidence of the accounts after considering the other evidence. According to the special commissioners, the other evidence does not support what is stated in the accounts.

The special commissioners discussed and analysed the contentions of the appellant in great detail and considered the relevant authorities at length from pp 29–49 of the case stated, and applied them to the facts of the case correctly. In the upshot, they held that the transaction entered

into by the appellant amounts to an adventure of a trade, thereby is assessable to income tax under s 4(a) of the Act.

In my judgment, the decision of the special commissioners is flawless and in accordance with the law. Accordingly, I affirm their deciding orders and dismiss the appeal with costs to the respondent.

Appeal dismissed.

Reported by Tan Cheng Siong